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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

No. 251

COLOGERO FASULO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

Fasulo was charged, tried and convicted of violating Section 215 of the Criminal Code of the United States. The real and only charge in the indictment is that Fasulo, Luppiparu, Moncivi and others had conspired to extort two thousand dollars from one, Lauricella and to realize that purpose had sent five threatening letters through the mails to Lauricella and had blown up, by means of dynamite a portion of his garage.

Fasulo, Luppiparu, and Vincenzo Mungivi were jointly tried before a jury on said indictment. Cata-

lano, jointly indicted with them, died before trial. The facts of the case, from the Government's standpoint, are briefly and substantially as follows: Catalano of San Francisco, became acquainted with the Lauricellas at their dry goods store in San Jose in the month of February, 1922. Up to that time the Lauricellas had never been molested by any one. Upon quitting said store to return home, Catalano told the Lauricellas that if any one should attempt to give them any trouble they should call upon him, that he would protect them. Very shortly thereafter and at brief intervals they received the threatening letters set forth in the indictment. Lauricella upon the receipt of the first two letters called upon Catalano for protection. After the receipt of the third threatening letter, Catalano went to the said store and told the Lauricellas that the boys wanted the money requested in their letters and that he could not stop them. About a week later, on the night of the 13th of March, 1922, Mrs. Lauricella saw two boys run across the street and into an empty lot and at the same time saw a bomb explode and wreck her garage. She identified them as defendants Vincenzo Muncivi and Alfonso Chiodo. Shortly thereafter the Lauricellas received the last two threatening letters. Upon the receipt of the last letter, acting under the instructions of Postal Inspectors, Madera and Austin, Mrs. Lauricella went to the home of Catalano and offered to give him two hundred and fifty ($250.00) dollars to satisfy the demands of those whom he called boys. Catalano learning that she had not the two hundred and fifty ($250.00) dollars with her, advised her to go to Lap-

piparu whom he told her was the high maffia and to apologize to him. Mrs. Lauricella on that occasion was also told by Catalano that Fasulo had written the threatening letters. (Tr. page 44.)

From Catalano's home Mrs. Lauricella went to the home of Luppiparu. She asked Luppiparu whether he wished to have the two hundred and fifty ($250.00) dollars delivered at his home or elsewhere. Luppiparu said he would go to her home the next day to get the money. The next afternoon Luppiparu appeared before Lauricella's store but would not enter. At that time Postal Inspectors, Madera and Grant were upstairs watching Luppiparu. The Lauricellas saw nothing more of Catalano or Luppiparu until after their arrest.

The Lauricellas, prior to their going to San Jose in 1920, kept a little dry goods store in San Francisco. Mrs. Lauricella testified that Fasulo had patronized her store and had written his purchases on her shop books; and that because of her memory of that writing she could swear that Fasulo had written the threatening letters. Fasulo denied that he had ever written on her shop books.

Two revolvers, two shotguns, a twenty-two gauge rifle, cartridges, dynamite, caps and fuse, were found, at the time of the arrest of the defendants, in the home of Vincenzo Muncivi. Muncivi testified that the dynamite, fuse and caps were used to blast stumps, the guns for hunting purposes.

Fasulo at the request of an old woman, who desired to see Giuseppe Muncivi personally, requested Fasulo

to write a letter to said Guiseppe Muncivi, not a defendant in this case, that he desired to see said Muncivi, in San Francisco. The Government introduced that letter and its envelope solely for the purpose of comparing the handwriting of the threatening letters with the handwriting of that letter and its envelope, and only to show that that envelope and those of the threatening letters were similar in size. The handwriting expert gave as his opinion that the threatening letters were in the handwriting of Fasulo.

The record establishes that Fasulo had no connection whatever with the conspiracy charged, other than that the evidence for the Government tends to show that the threatening letters were in his handwriting. That evidence is purely and solely of a circumstantial nature, and consists, as we shall hereinafter show, of only the opinion of the handwriting expert and that of Mrs. Lauricella.

The fact that the envelopes of the threatening letters and the envelope of the Giuseppe Moncivi letter were similar in shape, if that be true, and the fact that Fasulo was Lappiparu's brother-in-law, are circumstances of such equivocal significance that we regard them of no evidentiary value and accordingly ignore them, as they should be, if the avoidance of grave injury and the ascertainment of truth are of concern. Thousands and perhaps millions of those envelopes are sold daily and they are the ones ordinarily used by the masses. As well contend that the coincidence in the use of the ordinary red two-cent postage stamp is an incriminatory circumstance. If

so who would be safe? The case against Fasulo plainly then reduces itself to said opinions and in all events is a pure case of circumstantial evidence.

The handwriting expert pointed out a few similarities between the handwriting of the threatening letters and the genuine handwriting of Fasulo; but those few similarities can be found in the handwriting of almost all writers who were taught the same system of writing as was Fasulo and were similarly situated as to education and calling in life. Fasulo was practically illiterate and was an ordinary laborer. It is only after much writing that the marked idiosyncrasies of handwriting appear. In a class of beginners the writing of one will look very much like the writing of any other member of the class; and that similarity will measurably persist if those members have little schooling, do little writing and are manual laborers.

On cross-examination a multitude of dissimilarities were pointed out to the expert; he could not and did not deny them, but took refuge in the time worn expedient of handwriting experts in answering that in those respects this practically illiterate laborer, Fasulo, had been able successfully to disguise his handwriting in ninety-nine per cent of said five relatively long letters. The expert pointed to no fact and gave no reason to support that conclusion. Nothing less than mind reading was required to determine whether the expert saw real disguise or merely said he did. Against an expedient so extremely difficult to overcome, and particularly since a jury are likely to

be awed by the reputation and professions of a solemn and omniscient looking expert into finding as a fact what they cannot perceive and what in fact does not exist, Fasulo should have been permitted to put in evidence the Columbus Bank letters (Tr. Assg. Error No. 18) to prove that the formation of certain letters was not peculiar to Fasulo but is a common feature of Italian handwriting and thus nullify the effects of said reputation and professions.

Mrs. Lauricella utterly failed to recognize her own handwriting, for she denied the fact that her initials M. L. written on said letter at Madera's direction and very obviously in her own handwriting were in her handwriting. (Tr. pages 52-55.) If she could not tell her own handwriting, what dependence should one have on her opinion as to Fasulo's handwriting, especially since she based her knowledge of his handwriting on the incredible fact that he had written his purchases on her shop books two years before the receipt of said letters? Of what value is the opinion of any practically illiterate layman as to handwriting, which is based upon his recollection of a writing he had casually seen two years before? To convict Fasulo she was willing to go to the absurd extent of testifying that a conspirator, then dead and particularly a conspirator of the class in question, had told her Fasulo had written the threatening letters. Almost as incredible as that testimony, is the testimony that Fasulo wrote his purchases on her shop books. Strange moreover it is that she could not produce a book or a single scrap of paper bearing the hand-

writing of Fasulo. Her testimony was strikingly and fully shorn of any weight it might have had and demonstrated to be utterly valueless when she was asked to pick out Fasulo's handwriting from the writing of nine other persons and she attributed all the writings to Fasulo. (Tr. pages 92-97.)

At the close of the Government's case Fasulo moved for a dismissal of this action as to himself (Tr. page 93), on the ground that the facts established violate no federal statute, and at the close of the evidence and before the jury retired requested an instruction to the effect that the evidence was insufficient to sustain a verdict of guilt. (Tr. page 110.)

Fasulo and Luppiparu were found guilty September, 1924 (Tr. page 30) and October 21, 1924 (Tr. page 35), were each sentenced to be imprisoned in the penitentiary for two years. Moncivi was acquitted.

We have called the Court's attention to the foregoing facts and comments not to show that in the conflict of evidence the jury should have believed Fasulo and his witnesses, for we are mindful that such conflicts are not matters for reviewing Courts, but merely to show the nature of the case against Fasulo, and the propriety and necessity of the instructions requested by Fasulo and by the trial Court refused, and furthermore to preclude the conclusion that the Government's case was so strong that the errors complained of are mere errors without prejudice.

INDICTMENT DOES NOT CHARGE AN OFFENSE UNDER FEDERAL LAW.

The allegations in the indictment to the effect that the threats were pretended and that the purpose of the conspiracy was to obtain money by false pretenses and representations are very obviously sham allegations and alien to the real facts. They were evidently imported into the indictment by its drawer because he feared that the real facts, which amount only to an attempted extortion, did not constitute fraud and therefore in no sense violated Section 215; in other words he believed that by alleging that the threats were pretended he could transmute what in essence is extortion into the fraud denounced by said section. The pleader would thereby cast a grave reproach upon the law, for he would have Section 215 declare:

"If you use the mails to convey threats actually meant to murder, and to blast property you have a perfect right so to use the mails; but, if you use the mails to convey pretended threats, you are guilty of a felony."

No effort whatever was ever, at any time, made by the Government to prove anything false or pretended in this case. Indeed, the Government was at pains to prove that the threats were serious and of a very dangerous character and import; merely witness the imposing array of miscellaneous deadly weapons which it introduced in evidence for the avowed purpose of showing the dangerous intentions of the defendants. The record establishes clearly, conclusively and beyond controversy and without the aid of the legal presumption, that men intend what they say,

threaten or do, that there was absolutely nothing in the entire case false or pretended.

The case that confronted the drawer of the indictment at the very outset is typical of that serious and dangerous species of systematic extortion, familiar to district attorneys, wherein unfortunately threats are notoriously all but idle and empty. Obviously then, the drawer of the indictment had nothing to warrant those sham allegations. In the circumstances to presume for the purpose of this review that said sham allegations are based in fact is, to say the least, to encourage an unwholesome strategy.

But, be the foregoing what it may, upon close analysis it will be found that those sham allegations do not modify, add to, or in any material respect affect the real and only charge in the indictment, and are therefore, at best, surplusage and to be ignored. They are much like the words unlawfully, wrongfully and fraudulently in a pleading where the facts pleaded negative them. They are also much like an epithet in a case of slander, which when wrenched from its context and considered alone, is *per se* actionable, but when considered in relation to the transaction pleaded, loses its power to defame because it is not predicable of the transaction.

Libel and Slander, 25 Cyc. 301;
Townsend on Libel and Slander, Sec. 29;
Allen v. Hillman, 12 Pick. 101-104;
Ogden v. Riley, 14 N. J. Eq. 186;
Fawsett v. Clark, 30 Am. Rep. 481-484;
Cock v. Weatherby, 5 Smedes and M. 333.

The indictment charges purely and simply an attempted extortion. Said sham allegations are nothing more than the conclusions of the pleader drawn from the ultimate facts pleaded, or rather they are his opinion as to the nature of the offense stated by those ultimate facts. If an attempted extortion is not an attempt to obtain money by false pretenses, ten thousand allegations to the effect that it is, cannot and do not make it such.

The allegations to the effect that the threats were pretended do not transmute nor do they to any extent or in any way affect the essential nature of the offense charged, to-wit, attempted extortion, because whether the threats were real or pretended, the offense is absolutely the same, namely, attempted extortion. Pretended threats would have been every bit as coercive and effective, and would have operated precisely in the very same way to induce fear and ultimately coerce and subjugate Lauricella's will as would have real threats. The agency operating to effect the delivery of the two thousand dollars to the wrongdoers, in either case would be precisely the same, namely, coercion, the very essence of and distinguishing characteristic of extortion. The *sine qua non* of fraud, as we shall hereinafter show, is that the victim must have turned over his property to the wrongdoer freely. Therefore, if a victim is coerced the offense is not to defraud. The concept fraud excludes and negatives coercion, for how can one be said to be defrauded if he knew before parting with his property that the wrongdoer wrongfully intended to deprive him of his

property? Coercion is plainly then the very antithesis of fraud and may be said to be a test of fraud.

Assuming that the threats were pretended, an assumption contrary to the fact and to the presumption to be indulged here, and further assuming that Lauricella had delivered the two thousand dollars to the defendants, what was the efficient cause of that delivery? Doubtless, the fear that coerced Lauricella's will. Manifestly then, the crime committed would be extortion and not fraud.

The time of this Court would not have been taken up with the foregoing discussion as to the indictment nor would we urge that the indictment does not state a federal offense, if the Circuit Court of Appeals had not practically refused to consider Fasulo's main point in this case, namely, that the facts proved at the trial establish nothing fraudulent and therefore, offend no federal law.

POINTS AND AUTHORITIES.

Fasulo urges the following points on appeal:

1. The facts established at the trial violate no federal statute.

2. The facts established at the close of the Government's case violate no federal statute and therefore, the Court erred in refusing to grant Fasulo's motion to dismiss the above-entitled case as against him.

3. The indictment does not state a federal offense.

4. The trial Court erred in giving certain instructions.

5. The trial Court erred in refusing certain instructions.

6. The Court erred in excluding and in admitting evidence.

7. Fasulo is not estopped from urging point 1.

Points 1, 2 and 3, involve nothing more than a proper construction of Section 215. Therefore, for the sake of brevity those three points will be discussed as point 1.

POINT 1.

The facts established at the trial violate no federal statute. Said facts establish simply and purely that five threatening letters were sent through the mails for the purpose of extorting $2000.00 from Lauricella.

To establish point 1, Fasulo proposes to show the following:

(A) *Naponiello v. U. S.*, 291 Fed. 1008, states the true construction of the statute, rather than *Horman v. U. S.*, 116 Fed. 350, because by Section 215, the statute has been vitally changed since the decision in the *Horman* case.

(B) The genesis of Sections 215 and 5480 shows that they were never intended to apply to the sending of threatening letters through the mails for the purpose of extortion.

(C) Extortion is a crime of violence and is not fraud.

(D) The punishment provided in Section 5480 was in no sense adequate to the grave offense of sending threatening letters through the mails, showing that the sending of threatening letters through the mails was not in the mind of Congress when it enacted Section 5480.

(E) *Horman* decision erroneously defines "to defraud" and is unsound.

A.

NAPONIELLO v. UNITED STATES, 291 FED. REP. 1008, SHOULD BE FOLLOWED RATHER THAN HORMAN v. UNITED STATES, 116 FED. REP. 350; BECAUSE BY SECTION 215 OF THE FEDERAL CRIMINAL CODE, THE STATUTE HAS BEEN VITALLY CHANGED SINCE THE DECISION IN THE HORMAN CASE.

The *Horman* case was decided in 1902. The statute then in force was Section 5480 of the revised statutes which read:

> "If any person having devised, or intending to devise any scheme or artifice to defraud * * * shall * * * place * * *"

The Federal Criminal Code and Section 215 thereof were adopted in 1909. *New words,* not contained in Section 5480, were introduced into the law by Section 215, which, with our italics, reads:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations or promises* * * * shall * * * place * * *."

What was the purpose of this change? Mr. Chief Justice Taft said in *Hammerschmidt et al. v. United States*, 265 U. S. 182-189, 68 Law. Ed. 968-971:

> "Section 5480 has since been again amended to make its scope clearer."

In other words, Congress has itself by Section 215, defined and settled the meaning to be given to the phrase "to defraud", as used in said section.

Judicial notice will be taken of the historical fact that the Federal Criminal Code was formulated by a Commission appointed by the President under the authority of an act of Congress. The propriety of defining with certainty the phrase, "to defraud", as it appeared in Section 5480, must have appealed to the Commission.

If the new words, "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises", were not placed in Section 215 for the purpose of defining the phrase, "to defraud", what could have been the reason for their insertion? It cannot be plausibly argued that those words were placed there to add an element which was not previously found in the statute; because those words were in effect the interpretation which had long before been given to the statute by the Supreme Court of the United States, in *Durland v. United States*, 161 U. S. 306, 40 Law. Ed. 709.

If the phrase, "to defraud", was intended by Congress to have any meaning beyond the words, "for obtaining money or property by means of false or fraudulent pretenses, representations or promises",

why did not Congress use words indicative of such additional meaning? Congress could, for example, have said, "or by any other means", if it had so intended.

Nor, can it be claimed, that those words were intended to leave the phrase, "to defraud", wholly unlimited and undefined: because that would leave undone the very work of clarification which was sought to be done by said change. If those words did not define, limit and thereby clarify the phrase, "to defraud", then they did not serve the purpose for which they were intended. But, no such result should be attributed to Congress, or the statute, without manifest reasons which are wholly lacking.

Why then should Section 215 with this change of language, be construed by *Horman v. United States*, a decision rendered seven years before the enactment of Section 215,—a decision which could not have considered and did not consider the new terms of Section 215 as it is now written?

If false or fraudulent pretenses, representations or promises are not a necessary element of the crime, why put them in the statute? It may not be assumed that Congress has multiplied entities without necessity.

The *Horman* case insists only upon the *wrongful purpose;* Section 215 requires not only a wrongful purpose, but also a specific kind of *wrongful means.*

By Section 215, Congress aimed to provide for the punishment of swindlers who appeal to the cupidity of the public by false representations, which they do not intend to carry out. If swindlers carried out

and performed their representations, neither Congress nor the public would have grounds for complaint. The extortioner appeals not to the cupidity of the public, but to the fears of a selected individual. It is not because his representations are false or fraudulent, that felonious punishment is provided for him by the statutes of the several states. The more genuine his representations, the more heinous is the extortioner's offense. Unlike the swindler, he offends most genuinely by carrying out his representations completely. It is impossible that Congress intended the terms of Section 215—appropriate for the punishment of swindlers—to apply likewise to extortioners.

Congress must be presumed to have made the said change in the language of the statute in contemplation of established rules of statutory construction.

(a) *"An amended statute is to be construed as if it had read from the beginning as it does with the amendment added to it or incorporated in it."*

Black on Interpretation of Laws, p. 375.

A revised or amended act is to be construed as a new and original piece of legislation.

Donlon v. Jewett, 88 Cal. 530-534;

Reed Orchard Co. v. Superior Court, 19 Cal. App. Rep. 648-656.

"In construing a statute intended as a code upon a particular subject, the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood,

and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. * * * It is, therefore, a general rule that in the construction of compilations, revisions, or codes, *when a provision is plain and unambiguous the court cannot refer to the original statute, for the purpose of ascertaining its meaning.*"

25 *Ruling Case Law*, Sec. 289.

(b) The words, "to defraud", usually signify "the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. * * *"

Hammerschmidt v. United States, supra.

By this change made by introducing with the word, "or", the phrase "for obtaining money or property by false or fraudulent pretenses, representations or promises", Congress evidently desired and intended by the said change to make it clear to certainty that in Section 215, the words, "to defraud", were to be taken as they "usually signify".

"The * * * word, 'or' is often used to express an alternative of terms, definitions or explanations of the same thing in different words, introducing a synonym for, or explanation of the preceding term; in which case, it has been held equivalent to 'to wit'; or such like expression as 'that is to say'; 'otherwise called'; 'being'."

29 *Cyc.* 1503;

Downs v. Allen, 22 Fed. Rep. 805-809.

"The word *or* is used in the sense of *to wit*, that is, in explanation of what precedes and making it signify the same thing."

2 *Bouvier's Law Dictionary*, p. 2422;

People ex rel. Raymond v. Latham, 203 Ill. 9, 67 N. E. 403-407;

Lewis' Sutherland on Statutory Construction, p. 757, note 30.

(c) The maxim, "*Noscitur a sociis*", applies:

"When two or more words are grouped together, and have ordinarily a similar meaning, but are not equally comprehensive, they will qualify each other when associated * * *."

Lewis' Sutherland on Statutory Construction, Sec. 414.

"It is a rule of construction that, when words of general import are used, and immediately following and relating to the same subject words of a particular or restricted import are found, the latter shall operate to limit and restrict the former."

Nance v. Southern Railway Co., (N. C.) 63 S. E. Rep. 116-118.

(d) *Expressio unius est exclusio alterius.* Congress by specifying the means as *false or fraudulent* manifested that means which are neither *false* nor *fraudulent* do not come under the prohibition of the statute.

(e) "In cases coming within the reach of the principle of *ejusdem generis*, general words are read not according to their natural and usual sense, but are restricted to persons and things of the same kind or genus as those just enumerated; they are construed according to the more explicit context."

Lewis' Sutherland on Statutory Construction, Sec. 437.

The Commission which formulated the Federal Criminal Code presented it to Congress, through Attorney General Knox, in 1901--prior to the decision in *Horman v. United States*. The construction adopted by the *Horman* case was not before the Commission; and the long list of authorities which the Commission cited with Section 215, did not include *Horman v. United States*.

> (*Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, Senate Document* No. 68, 57th Congress, First Session.)

If Congress had intended to make threats against life an element of crime under this statute, it would seem that Congress would have specified such threats, especially since it specified "false or fraudulent pretenses, representations or promises".

Considerations, such as the foregoing, doubtless weighed with the Circuit Court of Appeals of the Seventh Circuit when it construed Section 215 not to cover a case of the kind here involved. We earnestly ask the Court to consider the decision in the *Naponiello* case as an authority to be followed for the special reason that it is a decision upon the statute as it now stands. That decision holds:

> "Section 215 was aimed originally at using the mails to promote 'schemes or artifices to defraud'. These quoted words show unmistakably that the victim's money must be taken from him by deceit * * * If we take judicial notice that bills to exclude blackmail and blackhand letters from the mails have been introduced in Congress that

would confirm our conclusion that the matters set forth in the indictment cannot constitute crimes against the nation until Congress has explicitly made them so."

Naponiello v. United States, 291 Fed. Rep. 1008.

The Supreme Court of the United States did not follow the Horman decision in the Hammerschmidt case. In the last mentioned case, the construction of Penal Code Section 37 reading: "If two or more persons conspire * * * to defraud the United States in any manner or for any purpose * * *", was the subject for decision. It was held that a mere open defiance of the governmental purpose to enforce the Selective Service Act was not included in the legal definition of a conspiracy to defraud the United States. Yet, unquestionably, if the Supreme Court had followed unreservedly the broad language found in the *Horman* case, the conviction would have had to be affirmed, instead of reversed, as it was reversed.

Even if said new words of limitation and clarification had not made Section 215 vitally different from Section 5480, it could not be urged that Section 215 is a re-enactment of Section 5480 and therefore must be read in the light of the *Horman* decision for two reasons: First, the *Horman* decision was the only decision involving extortion. It would be an abuse of language to say that one decision can establish a fixed and settled and notorious construction of a statute. Such construction is required before the presumption can be invoked. So hold the following authorities

cited by counsel for the Government in said Circuit Court and not as he maintained:

U. S. v. Cercedo-Hermanos, 209 U. S. 337-339;
Whitney v. Fox, 166 U. S. 637-647;
Warner v. Texas & P. R. Co., 164 U. S. 418-423;
Dollar S. Bank v. U. S., 19 Wall. 227-237, 86 U. S. 237.

Second, only Courts of Last Resort can establish the required fixed and long established construction.

Andrews v. Hovey, 124 U. S. 694;
Beals v. Hale, 4 How. 37-54, 45 U. S. 54;
Smith v. Baker, 49 Pac. 61-65;
Ancient Order H. v. Sparrows, 1 Ann. Cases 144;
Van Bremer v. U. S., 168 Fed. 889-891.

B.

THE GENESIS OF SECTION 215 OF THE FEDERAL CRIMINAL CODE AND OF SECTION 5480 OF THE REVISED STATUTES SHOWS THAT THEY WERE INTENDED TO COVER SCHEMES TO DEFRAUD, THAT IS, SCHEMES TO OBTAIN MONEY OR OTHER PROPERTY BY DECEPTION MERELY, AND NOT TO COVER SCHEMES TO EXTORT, THAT IS, SCHEMES TO OBTAIN MONEY OR OTHER PROPERTY BY THREATS OF VIOLENCE, REAL OR PRETENDED.

The law regarding "schemes or artifices to defraud" did not originate in Section 5480 of the Revised Statutes. That section as first enacted was only a re-enactment of Section 301 of Act of June 8, 1872, "an Act to revise, consolidate and amend the Statutes re-

lating to the Post Office Department." (Vol. 17, U. S. Stat. at Large, c. 335, p. 283, *et seq.*)

The error in the *Horman* decision may fairly be attributed to the failure of the Court in that case to trace Section 5480 to its source. The meaning of a phrase cannot be judged with security without considering the context in which such phrase occurs.

> "Sections, clauses and provisions of a statute, as well as the particular words and phrases employed are not to be considered in themselves alone and construed as if isolated from the rest, but they are to be interpreted with reference to the language surrounding and accompanying them —— the context; and if there is any ambiguity or doubt as to their intended meaning the context must be consulted as a means of removing the obscurity."
>
> *Black on Interpretation of Laws*, Section 82, page 242.

> "Their Lordships conceive that one of the safest guides to the construction of sweeping general words which it is difficult to apply in their full literal sense is to examine other words of like import in the same instrument and see what limitations must be imposed upon them. If it is found that a number of such expressions have to be subjected to limitations or qualifications and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification."
>
> *Blackwood v. Queen*, Law Reports 8, Appeal Cases, (82) 94.

Now, Section 301 of the Act of June 8, 1872, was only one of three sections in that Act dealing with

schemes to defraud. These three sections were Sections 149, 300 and 301. They read as follows:

"Sec. 149. That it shall not be lawful to convey by mail nor to deposit in a post office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, and a penalty of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction in any Federal court of the violation of this section."

"Sec. 300. That the Post Master General may upon evidence satisfactory to him that any person, firm or corporation is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to any such person, firm or corporation of any postal money order drawn to the order or in favor of him or them, and may provide by regulations for the return to the remitter of the sums named in such money orders * * *."

"Sec. 301. That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States) by means of the post office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do) place any letter or packet in any post office of the United States, or

take or receive any therefrom, such persons, so misusing the post office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred ($500) Dollars, with or without such imprisonment as the Court shall direct, not exceeding eighteen calendar months. The indictment, information or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the Court thereupon shall give a single sentence and shall proportion the punishment especially to the degree to which the post office establishment enters as an instrument into such fraudulent scheme or device."

The Revised Statutes did not repeal any of said three sections; on the contrary, each of said sections is given a place in the Revised Statutes. But, instead of being obviously associated and related together as they were in the Act of June 8, 1872, said three sections were by mere numerical arrangement so separated and apparently so dissociated, in the Revised Statutes, that their kinship is not at once recognized. Without substantial change, Section 149 became R. S. Section 3894; Section 300 became R. S. Section 4041; and, Section 301 became R. S. Section 5480.

Section 149 embodied the first proposed law on schemes to defraud, so far as we have been able to find, after much investigation. It is an unquestionable fact of the country's history of which Courts will take judicial notice, that said Act of June 8, 1872, was in large part an adoption by Congress of the work of a Commission appointed "to revise, simplify and consolidate the laws of the United States", under authority of an Act of Congress passed June 27, 1866. (14 U. S. St. at Large, c. 140, p. 74.)

Said Commission published in 1869 a so-called Postal Code, the formal title of which was: "The Statutes Relating to The Postal Service as Revised, Simplified, Arranged and Consolidated by the Commission Appointed for That Purpose from the Various Acts and Resolutions Now in Force, in Whole or Part."

Postmaster General Creswell appointed a Committee of postoffice officials "to examine and report" upon said Postal Code. On March 30, 1870, said Committee submitted their Report, of which a copy is now on file in the Congressional Library. Nothing was said in the Postal Code about "schemes to defraud"; but Section 152 of the Postal Code contained a regulation on letters or circulars concerning lotteries. The Committee proposed to enlarge and strengthen Section 152 and to bring under its provisions letters or circulars "concerning schemes devised and intended to deceive and defraud".

The Committee's Report (pp. 19 and 20) reads:

"GIFT ENTERPRISES AND LOTTERIES.

In section 152 the amendments we propose are obviously such as are necessary to the efficiency of the law. It contains no penalty. It is a naked declaration. We are of opinion that Congress ought to go to the extreme limit of its power to prevent the frauds which are perpetrated by lottery swindlers through the mails, and which they could not successfully carry on except by using mail facilities. An effort was made some time since to secure the passage of an act 'to prevent the perversion of the mails to improper purposes.' It was partially successful. The act proposed was so drawn as to affix moderate penalties to the commission of the offenses therein described, for

without such penalties the law would be a dead letter. The penalties were stricken out, leaving the act practically inoperative. The report and draught of an act on this subject were forwarded to Congress by one of your predecessors. We strongly recommend the passage of an act similar to the one proposed, but if that is deemed inexpedient, we then suggest that some discretionary power be given to the officers of the department to prevent the nefarious operations of lottery gamblers through the postal service. For want of a more satisfactory statute we suggest that section 152 be amended so as to read as follows:

"Sec. 152. It shall not be lawful to *convey by mail nor* to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes, *or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses; and any such letters or circulars shall be detained by the postmaster at the office of mailing or delivery, and disposed of under the instructions of the Postmaster General.*"

A comparison of said Section 152 of the Postal Code, as amended by the Committee, with Section 149 of the Act of June 8, 1872, demonstrates that Congress adopted the suggestion of the Committee *literatim et verbatim,* except that Congress substituted the penalty of a fine instead of detention and disposal of the letters or circulars.

But, Congress went further than the Postal Code or the Report of the Committee, in enacting Sections 300 and 301, although no doubt said sections accorded with the hopes and wishes of the Post Office Department.

Now, there is no room for doubt that Section 149, especially in view of its origin as described hereinabove, was not intended to apply and did not apply to schemes *to extort*, that is, schemes to obtain money by threats of violence. There is no evidence, either intrinsic or extrinsic, that in enacting this section, Congress had in mind threats of violence, either real or pretended. On the contrary, all the evidence, intrinsic and extrinsic, shows that Section 149, contemplated pure and simple schemes to defraud, that is, schemes to obtain money by deception only.

Section 300 is closely related to Section 149. While Section 149 forbids the conveying by mail or deposit in a post office to be sent by mail of any letters or circulars concerning "schemes devised and intended to deceive and defraud the public for the purpose of obtaining money by false pretenses", Section 300 authorized the Postmaster General upon evidence satisfactory to him, to forbid the payment of any postal money order drawn in favor of any person engaged in conducting any "fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance or drawing of any kind or conducting any *other scheme or device for obtaining money through the mails by means of false or fraudulent* pretenses, representations or promises."

Unquestionably, these two sections relate to two different aspects of the same subject matter. Disregarding its bearing on lotteries, etc., Section 149 dealt with the conveyance or deposit of letters or circulars concerning schemes to defraud by means of

false or fraudulent pretenses. Disregarding its bearing on lotteries, Section 300 dealt with the seizure and disposal of money orders drawn in favor of those conducting "schemes or devices for obtaining money through the mail by means of false or fraudulent pretenses, representations or promises." There is not a syllable in Section 300 to indicate that it was intended to apply to postal money orders drawn in favor of a person who was conducting a scheme *to extort,* that is a scheme to obtain money from the sender by threats. If Congress had intended to legislate upon the last mentioned phase of human conduct by Section 300, it could easily have found words fitted to express its intention. It did not use such words; because Congress had no such thought in mind in enacting Section 300. And how absurd it would be to suppose that any "person, firm or corporation" would conduct a scheme *for obtaining money through the mails* by means of threats of violence to person or property! The extortioner would disclose his identity and render discovery certain—just what extortioners aim to avoid. There is nothing false about a real threat of violence. Nor is there anything *fraudulent* about such threat; because, a thing is fraudulent when it is intended to deceive. A real threat is intended not to deceive but to terrify.

As for *pretended* threats, a threat is no more and no less effective, because it is pretended. The victim of a pretended threat is injured no more and no less than by a real threat. On the moral side, the fact that a threat is only pretended may be a mitigating circumstance; it is certainly not an aggravating cir-

cumstance. But, it is an observable fact that no legislature has made a distinction between real and pretended threats. (For a typical example, see Section 523 of the Penal Code of California, enacted February 14, 1872, almost identical with Section 618 of Field's 1864 draft for New York Penal Code.)

No statute has been found which punished a real threat and at the same time excused a pretended threat; but on the other hand, no statute has been found which made it criminal to make a pretended threat and treated a real threat as constituting no offense.

It is certain that Congress did not mean to punish real threats in enacting Sections 149, 300 and 301 of the Act of June 8, 1872; it is inconceivable that Congress meant by them to punish pretended threats.

When false or fraudulent pretenses, representations or promises enter into business transactions, to the extent of constituting a crime, the false or fraudulent character is of the very essence of the offense. Congress evidently meant to punish wrongs in which deception was of the very essence, not wrongs such as pretended threats in which deception was an unimportant and insignificant circumstance merely.

It would seem that this construction of the law agreed exactly with the interpretation given to Section 5480 in *Durland v. U. S.*, 161 U. S. (306, 313; 40 L. Ed. p. (709) 711.

Section 149 expressly used the term, "schemes devised and intended to deceive and defraud", which

signified no more and no less than the term, "scheme or artifice to defraud".

Section 300 does not expressly use either of the terms last mentioned; but it expressly gives what amounts to a description of a species of the genus, "scheme or artifice to defraud", when it speaks of "any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises". Just for the reason that Section 300 was limited to dealing with schemes to defraud which had for their object *obtaining money through the mail*, it was important that some provision should be made which would attach a penalty to those who dealt in schemes to defraud generally, whether they contemplated obtaining money through the mail, or obtaining money or property through the mail or otherwise. It was, therefore, appropriate that Section 301 should use the generic term.

Section 301 placed a penalty not on mere agents or tools, but upon the principal offender. Section 149 did not specially point to one who *devised* a scheme to defraud; Section 301 did so point. Section 301 declared that a person who "having devised" any "scheme or artifice to defraud" shall "in and for the execution of such scheme or artifice" place any letter in any United States post office is guilty of a misdemeanor and liable to prescribed punishment. Certainly, the person who should "devise" a "scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises", such as contemplated by Section

300, would beyond a doubt be answerable under Section 301. (*Durland v. U. S.*, 161 U. S. (306) 313; 40 Law. Ed. (709) 711.) We have seen that Section 300 does not contemplate a scheme for obtaining money through the mail by threats? Why should it be assumed that the "scheme or artifice to defraud" referred to in Section 301 is different in kind from the "schemes devised and intended to deceive and defraud" referred to in Section 149? And, is it not plain that Congress contemplated that the "scheme or artifice to defraud" provided against in Section 301 should necessarily involve and essentially require as indispensable means, "false or fraudulent pretenses, representations or promises"? And, ought not Section 5480 have been given, as a necessary element, by judicial construction, the same element? How can it be supposed that the persons who devised schemes to defraud would have any more ordinary or natural use for the postal service than for the purpose of making false or fraudulent pretenses, representations or promises to their victims?

If there were any difference in kind between the scheme to defraud contemplated by Section 301 and the scheme to defraud contemplated by Section 149, why did Congress fail to include such scheme to defraud in Section 149 as well as in Section 301. There was no such difference; hence there was no need to enlarge Section 149.

It is apparent from the language of Section 300 that the scheme or device therein contemplated was a scheme or device, *first*, for obtaining money; *second*, through the mails; and, *third*, by false pretenses, rep-

resentations or promises. A scheme or device to defraud was contemplated; but unless the money was to come through the mails, the penalty provided by the section could not be executed. But, is it conceivable that if any "scheme or artifice to defraud", within the meaning of Section 301, also involved obtaining money through the mails, that such "scheme or artifice to defraud" would not be subject to the provisions of Section 300? To argue that it would not be thus subject, is to argue that Congress left a "breach in the wall" of Section 300 "large enough to admit an army." But, that cannot be. The complete and satisfying answer is that the scheme or artifice to defraud contemplated by Section 301 is the same scheme or device referred to in Section 300, but not limited to obtaining money through the mails. Neither section contemplated a scheme to extort.

As Section 301 of the Act of June 8, 1872, should have been construed in the light of Sections 149 and 300 of the same Act, so also should Section 5480 of the Revised Statutes have been construed in the light of R. S. Sections 3894 and 4041, and their predecessors as well as its own.

Rev. Stat. § 5600.

It was evidently for the purpose of avoiding misconstruction and of restoring the law not alone actually but also apparently, to its original condition as intended by the Act of June 8, 1872, that the revising Commission in drafting Section 215 of the Criminal Code inserted after the words "scheme or artifice to defraud", the very words (adding only, "or property", and leaving out, "through the mails"), which

occur in Section 300 of the Act of June 8, 1872, namely, "for obtaining money or property by means of false or fraudulent pretenses, representations or promises."

The statute does not therefore, apply to schemes to extort, that is to schemes to obtain money by threats actual or pretended, but only to schemes to defraud, that is, to schemes for obtaining money or property by false or fraudulent pretenses, representations or promises.

C.

EXTORTION IS NOT FRAUD.

Extortion of the species and character here involved, like its near relation highway robbery, is essentially and characteristically a crime of violence, and is put by law writers in the same category as highway robbery. The will of the victim in both offenses is coerced, overpowered, subjugated by violence or by threats of violence, which are in reality a form of violence. Fraud, on the other hand, is essentially and characteristically the crime of craft, of cunning, of artfulness, of duplicity; it achieves its purposes by means the very opposite of violence. It is by nature sly, underhand and violence shunning. The decisions and the treatises of law writers are replete with expressions which recognize and imply that fraud is in its essence and nature the very opposite of violence; as for example: The property was obtained by fraud, not by force. Consent was obtained by fraud, not by violence. One can take up almost any

text book either on contracts or on wills and find that duress and fraud are differentiated by an essential difference. It should require no additional authority or argument to establish said essential difference; however note hereinafter a full confirmation of the foregoing by no less an authority than Jeremy Bentham.

Doubtless, Chief Justice Taft had the aforementioned distinction between extortion and fraud clearly in mind when he said in his opinion in *Hammerschmidt v. U. S.*, 265 U. S. 182:

"*They* (referring to the phrase to defraud) *do not extend to theft by violence.* * * * One does not class robbery *or burglary among frauds.*" We venture to assert that Mr. Justice Stone of this Court had said distinction in mind when he, as Attorney General of the United States, recommended to Congress in his report of December 9, 1924, the enactment of a statute making the sending of threatening letters through the mails a federal offense. The solution of the point now under ~~decision~~ discussion can be compressed into one short sentence: Fraud is not predicable of crimes of violence. However, out of an abundance of caution, we add the following analysis:

ANALYSIS OF FRAUD AND OF EXTORTION SHOWS THAT THEY ARE ESSENTIALLY DIFFERENT OFFENSES.

Extortion accomplishes its purpose by coercing the will of the victim. Fraud attains its purpose by tricking the mind of the victim. Note that they ad-

dress themselves to and operate upon different faculties, and that the operating agencies are essentially different. The operating agency in extortion is coercion; in fraud it is deception. The offences are as essentially different as a battery is from a libelous article. Battery and libel and embezzlement and theft injure but in different ways and are different crimes. Viewing extortion and fraud from the essential difference as to consent, they differ more essentially than theft and embezzlement. In extortion the victim gives no real consent to parting with his property; his consent is like that of the victim who turns over his watch to the highwayman at the point of a pistol. In fraud, to the very contrary, the victim genuinely and freely consents to part with his property. The victim of fraud turns over his property to the wrongdoer, not because he is coerced, but because he hopes or sees the prospect of getting far more in return than he parts with; in other words he does so freely and voluntarily. One cannot be said to be defrauded who knew in advance the felonious intent of the wrongdoer to deprive him of his property.

To confirm the foregoing analysis we quote the following from Jeremy Bentham's treatise, Morals and Legislation (Edition 1823), page 137, chapter 16, heading "division of offenses".

> "If the physical faculty (meaning property) in question was obtained with the assistance or consent of a proprietor (meaning owner), or other person above spoken of (meaning person authorized by owner), and still the occupation of the thing is an offense, it may have been either

because the assistance or consent was not *fairly*, or because it was not *freely* obtained. If not fairly obtained, it was obtained by falsehood, which if advised, is in such a case termed *fraud:* and the the offence if accompanied with the intention of not being amenable to law, may be termed *fraudulent obtainment or defraudment*. If not freely obtained, it was obtained by force; to wit, either by a force put upon the body, which has been already mentioned, *or by a force put upon the mind*. If by a force put upon the mind, or in other words by the application *of coercive motives*, it must be by producing the *apprehension of some evil:* which evil, if the act is an offence, must be some evil to which on the occasion in question the one person has no right to expose the other. This is one case, in which, if the offence be accompanied with the intention of detaining the thing forever, whether it be or be not accompanied with the intention of not being amenable to law, it seems to agree with the idea of what is commonly meant by *extortion*."

It is needless to state to this Court that Bentham was a genius acute and profound and was one of the greatest legal philosophers and law reformers of all time. His name was especially great and his influence on legislation especially great at the time of the enactment of Section 5480 and for many years prior thereto. It is therefore to be assumed that Section 5480 was enacted with knowledge of Bentham's distinction between extortion and fraud.

Another wide and essential difference between extortion and fraud is that guilt attaches to the extortioner because he carries out his representations; to the swindler, on the contrary, because he fails to carry them out. Obviously where the diversity is so extreme

and complete, a section appropriate to swindlers is not appropriate to extortioners.

Civil fraud embraces criminal fraud and by far more. Civil fraud is predicated of many transactions which are not in fact fraudulent; as for example, the purchase by a guardian in good faith and for value of the property of his ward. According to Section 3440 of the Civil Code of the State of California, the sale of certain personal property unaccompanied by an immediate delivery regardless of intention is conclusively presumed to be fraudulent as to the creditors of the seller. Civil fraud often takes no account of intention. Criminal fraud to the contrary, always makes intention a matter of first importance. Very obviously civil fraud is of far greater compass than criminal fraud. Not all definitions of fraud can, therefore, be used in ascertaining the meaning of the word fraud in a criminal statute. For the sake of being conservative in the following discussion it will be assumed that there is no difference between civil fraud and criminal fraud and that they are identical.

Explore civil fraud in all its manifold and varied forms and phases and in all its extension, and it will finally be found that it can be consummated only in two ways, namely by *deception* or by *circumvention;* in other words there are only two species of fraud, viz., fraud of deception and fraud of circumvention.

Appropriate here is the following quotation from the second page of the introduction of that excep-

tionally profound and exhaustive treatise of Professor Melville M. Bigelow on the law of Civil Fraud:

> "Fraud is divided into two great branches, deception and circumvention.—Deception is treated as fraud and *implies some transaction between the wrongdoer and the party wronged* either directly or through an agency; circumvention is treated as fraud *not touching motives*, and implies *the absence of any transaction* between said parties."

The fraud of circumvention was not hereinbefore mentioned because it has no application to this case. In the first place the very etymology of the word circumvention shows that it is inapplicable here. The facts established at the trial show very direct action and no evasion or other artful conduct such as the word circumvent connotes; witness the blowing up of the garage, the formidable array of deadly weapons and blasting paraphernalia the Government was at pains to put in evidence.

Secondly the fraud of circumvention implies the *utter absence of dealings or transactions between wrongdoer and his victim.* (See *Bigelow*, supra.) Here there were dealings between wrongdoer and victim. A good example of the fraud of circumvention is to be found in a fictitious sale to defeat the claims of creditors. Those proceedings are, so to speak, unilateral the victims have no part therein, and their motives are not played upon by the wrongdoer.

Thirdly, Sections 215 and 5480 very plainly contemplate fraud touching motives and dealings either mediate or immediate between wrongdoer and victim;

but, the fraud of circumvention does not touch motives and it implies the absence of any transaction between wrongdoer and his victim. (*Bigelow,* supra.)

That Section 5480 did not contemplate the fraud of circumvention is recognized in *U. S. v. Wallen,* 29 Fed. 702, for the decision says:

> "Nor would it come within the meaning of this section if one had ordered goods and afterwards devised a purpose of escaping from paying for them."

It is to be assumed in construing said sections that Congress entertained a becoming respect for state rights and had no disposition to intermeddle in essentially local offenses. The frauds of circumvention, as the foregoing examples show, are practically speaking, purely local and not far flung offenses. The respective states can very well handle them and do handle them effectively. There is no greater necessity or propriety for congressional legislation respecting those offenses than there is for the local crimes of murder, highway robbery, arson, libel, etc. Conspiracies for the commission of those crimes are fully as frequent, if not more so, than offenses of the fraud of circumvention. The mails have been used to further schemes to murder and to commit a multitude of other local crimes. If such instances of misuse of the mails have not moved Congress to intrude in state affairs and to legislate against those offenses, why should it be supposed or presumed that Congress has been aroused and has legislated as to offenses of the fraud of circumvention which use the mails less and are every bit as much local crimes? For a more

thorough discussion of this matter and of the nature of fraud read our criticism of the *Horton* case, infra; also because we therein show more fully than heretofore, that fraud cannot be predicated of crimes of violence.

It is quite another matter respecting confidence games and swindling schemes which almost necessarily employ the public agency of the mails to reach and victimize the credulous and unsuspecting, beyond the confines of the state of the culprits. Those games and schemes, with rare exceptions, are far reaching; their activities extend into and over many states and even into foreign countries, as said history of Section 5480 will abundantly attest.

Nothing more natural, proper or even necessary than that Congress should have taken concern and legislated against said far reaching crimes, particularly since in the very nature of things, the states are unable adequately to cope with them. Note the following quotation from *U. S. v. Clark,* 121 Fed. 190-191. Speaking of the Postal Department, "it affords to defrauding schemes a far wider range and greater chance for immunity on account of the distance at which they are undertaken."

Contemporary construction shows most satisfactorily what was the mischief in the mind of Congress when it enacted said sections. Suffice the following quotation from *U. S. v. Owens,* 17 Fed. 72-74, speaking of the Postal Department.

> "It appears to the Court that the act was designed to strike at common schemes of fraud

whereby through the post-office circulars etc. are distributed generally to entrap and defraud the unwary and not the supervision of the commercial correspondence solely between a debtor and creditor."

See also:

U. S. v. Mitchell, 36 Fed. 492;
U. S. v. Fay, 83 Fed. 839;
U. S. v. Wallen, 29 Fed. 72.

Though *Harrison v. U. S.*, (200 Fed. 662-666), is not contemporary construction it should be read because it shows what schemes and artifices were leveled at by Section 215.

Since the fraud of circumvention has no application to the facts of this case, and the facts proved at the trial disclose no deception whatever, it follows necessarily that said facts establish no fraud and therefore the judgment herein should be reversed. In other words the two tests of fraud, namely circumvention and deception have been applied to the said facts and the result in each test is absolutely negative.

D.

THE PUNISHMENT PRESCRIBED BY SECTION 5480 WHEN ENACTED SHOWS THAT EXTORTION OF THE CHARACTER IN QUESTION WAS NOT IN THE MIND OF CONGRESS.

Section 5480 prescribed the punishment of a fine of not over five hundred ($500.00) dollars or not over *eighteen* months in the penitentiary or both. Quite obviously if Congress had in mind the crime of ex-

tortion of the character in question the punishment prescribed would have been by far severer, for that crime is classed with highway robbery.

It may be assumed that Congress when enacting a criminal statute was advised of what had been done in that regard by other great nations, particularly England. In England an attempt to defraud or a defrauding by false pretenses such as is contemplated by Section 5480 or Section 215 is punishable by not over five years in the penitentiary. The sending of threatening letters demanding money, on the other hand, *is* punishable by life imprisonment. It is unthinkable that Congress by Section 215 meant also to punish a crime so heinous as the crime of extortion of the character in question.

E.

THE HORMAN DECISION (116 FED. 350) ERRONEOUSLY DEFINES THE PHRASE "TO DEFRAUD" AND IS UNSOUND.

Apart from the vital change in the law effected by Section 215, the *Horman* decision should not be regarded as an authority, for it is based upon and is the result of the fallacy of definition. The phrase "to defraud" has acquired in law a well defined legal significance, in other words a technical meaning, just as have a great multitude of other words and phrases in common use, as for example, to steal, to forge, to embrace, to aid and abet, to debauch, to endorse, to dishonor, to utter, to harbor, to intervene, to conspire, to enter upon land, to encumber, community property,

joint tenancy, waste, malice, nuisance, residence, contract, deed, family, appearance, grant, candidate, delivery, dependent, insolvent, crime, charity.

The masses give said words and phrases, a broader, looser, and less defined meaning than that which they have acquired in legal and in legislative circles. Let us note the first and the last example. To steal in a criminal statute is confined to larceny, while in loose common parlance it includes embezzlement and other kinds of wrongful deprivation of property. The legal meaning of charity is much narrower than the meaning given to it in common speech.

In *Adams v. Turrentine*, 30 N. C. 147-150, the Court while finding that the words "negligent escape" had acquired a special significance in law, restated the well established and universally recognized rule of construction, in the following words:

> "For it is an ancient rule for the construction of statutes, that when they make use of words and phrases of a definite and well known sense in law they are to be received and expounded in the same sense in the statute."

The same rule was restated in the following decisions:

Hawley v. Diller, 178 U. S. 476; 44 L. Ed. 1157, finding that "bona fide" had a special legal significance;

Merchants Bank v. Cook, 4 Pick Mass. 406, finding that the word "party" has a special significance in law;

Adams v. Apple, 1 Head 348;

Weindell v. Weindell, 29 S. W. 751, finding "dower" had a special legal significance.

The Court therefore, in construing Section 5480 should have applied to the phrase, "to defraud", the special meaning it had in law. To have applied to said phrase any meaning other than that intended by the Congress which enacted Section 5480 was to amend the statute by judicial construction. We can however, if need be without danger of any untoward results to Fasulo, freely concede that the Court would have observed the true rule of construction had it applied the popular meaning of said phrase. The words "popular meaning" are to be understood however in the light of the following quotation:

> "On the one hand it must be assumed that the legislature expresses itself in a manner appropriate to the dignity and solemnity of a statute and hence its words must be taken in the sense accorded to them by those who use the English language with correctness and perspicuity, not in any secondary, colloquial or slang sense, though the particular expression may be so used in the speech of the vulgar." (*Black Interpretation of Laws* (2nd Ed.), Sect. 52 page 144.)

But the Court even overlooked the popular meaning of "to defraud" and made a search of the dictionaries and of examples of the fraud of circumvention (which are not contemplated by Section 215, nor are they applicable to the facts here), for a meaning to apply to said phrase. It selected the broadest definition given and then applied it in a broader sense than that intended by the dictionary.

To withhold wrongfully from another what is due him, to sell one's property to avoid paying one's creditors, and the other example cited in the *Horman*

decision in support of its said definition, are, if and provided the withholding was consummated by circumvention, examples of the fraud of circumvention. But if the withholding was effected by violence they are not examples of fraud in any sense whatever.

Mr. Chief Justice Taft in his opinion in the *Hammerschmidt* case well points out that the withholding or deprivation of property by violence is not fraud. Back of said definitions given by the dictionary is the assumption that the deprivation was accomplished by circumvention and not by violence. The Court overlooked that assumption; and that oversight, in a measure, accounts for its erroneous decision. In other words the Court took its said definition to mean that any wrongful deprivation of property, regardless of how effected, was the perpetration of a fraud. That misapprehension constitutes said fallacy of definition.

The indiscriminate choice of definitions given by a dictionary and dependence thereon, in defining the terms of premises, is a fruitful source of error. (*Baker and Huntington, Principles of Argumentation,* page 22.)

The dictionary defines "knave" not only as a rascal but also as a boy and a servant; "idiot" not only as one born without understanding, but also as a simple unlettered individual; "notorious", well known for good or for evil; "murder", the verb, not only to kill a human being with malice aforethought, but also to abuse, and to violate anything grossly; "rob", not only to steal by violence but also to hinder and to delay.

A Court under a statute forbidding the crime of murder, if it be minded to choose one of the said definitions of murder, could hold a person for murder who had simply abused or violated something grossly; under a statute forbidding robbery it could hold a person for robbery who had simply hindered or abused another. The foregoing examples though confessedly extreme, sufficiently show the likelihood of serious errors resulting from an indiscriminate dependence on dictionary definitions, to say nothing of unintended yet nevertheless grave invasions of the constitutional province of Congress by the Courts.

Even more fruitful of error than the indiscriminate choice of dictionary definitions is the application to words of a statute, the loose, vague and inexact meanings which the masses attach to those words. That vagueness, looseness and inexactness of use is by no means the monopoly of the uneducated; for the educated often enough sin in the same respect. Who has not heard even the educated say that they were robbed, when they simply meant that they were charged a high price or had disposed of some property at a price lower than that which they could have obtained, had they been diligent in ascertaining the real value of the property? It would not be surprising that kindred errors, because of said habits of mind, have occasionally crept into legislation, text books and even into decisions, especially where the problems or questions involved did not call for close analysis and exact definition.

But the misuse of a word whether of the ignorant or of the highly educated in moments of carelessness

or of inadvertence or of lack of sufficient thought, is certainly no criterion to be depended on or resorted to in construing a criminal statute.

Laws which create crime ought to be so explicit that all men subject to their penalties may know with certainty what acts it is their duty to avoid.

U. S. v. Brewer, 139 U. S. 278-288; 35 L. Ed. 190-193;

Brill, Encyc. Criminal Law, Sec. 62, page 133;

Wharton, Criminal Law (11th Ed.), page 53, Sec. 40 Note 4;

U. S. v. Sheldon, 2 Wheat. 119, 4 L. Ed. 199.

If any definition of a dictionary or the misuse of a word may be resorted to in construing a statute, then the ascertainment of what was in the mind of the legislature is not the paramount rule of construction, nor then is our boast that our laws are statutory, founded in fact, nor then is it true that promulgation is one of the first essentials of a law, for such a law would have no more promulgation than had those certain laws which Caligula caused to be written in very small characters then posted high on the pillars of public buildings.

SAME TENDENCY IN HORMAN DECISION AS IN LOWER COURT'S DECISION IN HAMMERSCHMIDT CASE.

There is in the *Horman* decision as there was in the decision of the lower Courts, which in turn decided the *Hammerschmidt* case, a decided tendency to stretch the meaning of the phrase "to defraud" beyond its usual and ordinary meaning in law. The decision of

the *Hammerschmidt* case also turned upon the meaning of the precise phrase herein question, namely, "to defraud". The lower Court and the Circuit Court of Appeals held that the printing, publishing and circulating of handbills dodgers and other matters intended and designed to counsel disobedience to the Selective Act by the defendants, was within the meaning of the phrase to defraud. This Court, speaking through Mr. Chief Justice Taft, held otherwise and pointed out the tendency of the said lower Courts to stretch the ordinary and usual meaning of that phrase. While the *Hammerschmidt* case did not call for the construction of Section 215, it did call for the construction of Section 37 containing the precise phrase here in question. All discussion of that phrase in that case is manifestly much in point here. True Mr. Chief Justice Taft did not in terms declare that the *Horman* decision was erroneous, but he was not called upon to overrule or even pass upon that decision, for, as he points out, after that decision Section 5480 was again amended to make its scope clearer. He did however, say that the decision went to the very verge. In the light of the examples cited, for instance, "one would not class robbery or burglary" among frauds and his other statements as to the nature of fraud, his statements are rather a disapproval than an approval of the *Horman* decision. But regardless of what was the Chief Justice's intention in making them, said examples and statements luminously show the essential difference between fraud and crimes of violence and are absolutely incompatible with the *Horman* decision; in other words they show that the *Horman* decision is unsound.

The tendency in the *Horman* decision to stretch the provisions of Section 5480 beyond what was intended by Congress is again revealed in the Court's effort to make the phrase "to defraud" coextensive with the phrase "to injure". Very palpably "to injure" embraces infinitely more than "to defraud".

That affords not only another proof of said complained of tendency but is in fact another fallacy pervading the *Horman* decision; namely, the conclusion of the Court, *"that to injure one wrongfully is to defraud him."* (Note the exact language of the Court at the bottom of page 352 and at the top of page 353.)

The burning of a bank or the residence of its president by a band of syndicalists or the destruction of a church by a mob of fanatics comes certainly within the very letter of said language. Either of the supposed cases constitute wrongful injury, wrongful and dishonest deprivation of property; but who would ever think of applying the word fraud to either case?

The Court to sustain its contention that to defraud is the very equivalent of "to injure", goes to the extent of indulging in refinements of reasoning which evince learning and subtle thought, but cast no light upon the real question then at issue, namely, the meaning of the phrase, "to defraud". The Court says: "These words referring to the words, 'scheme or artifice to defraud' are not descriptive of the character of the artifice or scheme which has been devised but rather of the wrongful purpose involved." If those words are not descriptive of artifice and scheme, it is hard to conceive what words would better ac-

complish that descriptive purpose. But assuming that said words be descriptive of the wrongful purpose and not of the scheme or artifice, what difference does that make? None at all, for in that event they are even more so words of limitation. But apart from our criticism of the Court's distinction, it is very plain that it affords no proof that "to defraud" and "to injure" are identical or coextensive terms.

Though distantly but yet related to said inclination to see in the phrase "to defraud" the equal compass of the phrase "to injure", is the Court's indulgence of the thought that the word scheme was susceptible of a legitimate and innocent purpose. Why stop to note and speak of that innocent purpose, when the word scheme is used with respect to crime?

The complained of tendency is again discernible in the Court's going to the extent of urging that other fallacy which vitiates the major premise of the *Horman* decision, namely, "That the underlying purpose of Section 5480 is to preserve the use of the mails to legitimate ends." If by underlying purpose is meant the purpose that Congress had in mind at the time of enacting said section, it is strikingly manifest from the conspicuous and very certain language of limitation in the section that no such purpose was in the mind of Congress. If Congress had that purpose in mind, it would not have inserted in Section 215 any language of limitation. That conclusion cannot be evaded or set at naught by saying that the words, "artifice and scheme to defraud are not descriptive of scheme but of the wrongful purpose", because a limitation of the purpose is still a limitation, and can not

be rightfully ignored by the Courts. As a matter of fact the limitation of purpose, if anything, is a greater limitation than is a limitation of the scheme. The Court in the *Horman* case lost sight of the quite common experience that executive officers are usually inclined to view with favor a construction of the statute which enlarges the field of the exercise of their authority. That fact was recognized by the Court in *U. S. v. Clark* (121 Fed. 191), in the following language, which also points out the true scope of the section and the necessity of resisting the tendency to extend the statute to mischiefs not aimed at by Congress: "Bad debts contracted by mail are even sought at times to be made the basis of a prosecution under it, but the federal law was not intended to bolster up the credit system of the country nor improve its morals." See also, *U. S. v. Mitchell,* 36 Fed. 493. This Court recognized said tendency to extend the statute in the *Hammerschmidt* case where it was sought to make Section 37 denounce the sending of circulars to hamper or thwart the selective act. The Court in the *Horman* decision in effect, holds in its said major premise, that the underlying purpose of Section 5480 is the protection of the morals of the country.

Now, on the other hand, if by underlying purpose is meant the basic reason for the enactment of Section 5480, regardless of what was the reason or purpose that moved Congress to enact said section, following the doctrine declared by the Court in the *Horman* decision to its logical consequences, there is hardly a crime conceivable which by judicial construction can-

not be brought within the purview of Section 5480, for the basic reason of all criminal legislation is the preservation of the peace, welfare and dignity of the state. If the Court's doctrine be the correct one, then only one statute need be enacted, for all offenses would be violative of the basic reason or purpose of that statute. Sending circulars to thwart the selective act, as was done in the *Hammerschmidt* case, would be, according to said doctrine, within the purview of Section 37, for the basic reason of that section, as well as that of Section 215, is the preservation of the peace, welfare and dignity of the United States.

The fallacy of that doctrine may be shown without making a labored search for the real ultimate or basic reason of criminal legislation. Suffice that pointed out by the Court. According to that, and supposing the Government to own and control the railroads, a statute prohibiting the transportation of dynamite over its roads, would also by the help of judicial construction, denounce the transportation of circulars counseling disobedience to the selective act, for the Court would declare that the underlying purpose of the statute was to preserve the railroads to legitimate uses. According to that doctrine, limitations no matter how clearly, aptly and emphatically expressed are utter nullities.

One glaring vice of said doctrine is that it forgets that the American people desire that our laws be statutory and that that only be a crime which has been clearly and specifically delimited as such by statute; and that they regard "constructive crimes built by the Courts with the aid of inference, implication and

strained interpretation repugnant to the spirit and letter of American and English criminal law."

Exparte McNulty, 77 Cal. 164-168; 19 Pac. 237.

Extortion of the character here in question is an offense, doubtless, by far graver than the offense of fraud denounced by Section 215. It is debatable whether Congress should intrude and legislate against extortion, for extortion is usually a purely local crime, as much so, as theft, murder and arson. The mails are used in furtherance of those crimes as much as they are in furtherance of extortion. Extortion very rarely or never has the wrongdoer in one state and the victim in another, as is the case with the confidence games and swindling schemes which Section 215 was intended to denounce. The State of California has enacted a statute against sending threatening letters to extort property; and Fasulo at the request of he United States Attorney for this district, showing thereby his doubt as to the application of Section 215 to the facts of this case, was indicted under said State Statute and said charge is still pending against him. Nearly every state in the Union has enacted a statute like said California Statute.

But whether there be or be not need for Congressional legislation against sending threatening letters through the mails, that is, in the first instance at least, the concern of Congress. The duty of the Courts is simply to decide. The Courts should bear in mind for the sake of the permanence of our institutions and of our form of Government, that that which has never been enacted by Congress can never be rightfully adjudged to exist by a judicial tribunal.

To give point to the foregoing we quote the following:

> "Regarding the rule of interpreting an ambiguous statute the object of the search is the meaning and intention of the legislature and the Court is not at liberty, merely because it has a choice between two constructions to substitute for the will of the legislature its own ideas as to the justice or policy of the law."
>
> *Black, Interpretation of Laws* (2nd), Section 27.

> "It is axiomatic that a statute creating and defining crimes cannot be extended by intendments, and that no act however wrongful can be punished under such statute, unless clearly within its terms. There can be no constructive offenses and before a man can be punished his case must be plainly and unmistakably within its terms." By Justice Brewer in *Todd v. U. S.*, 158 U. S. 283; 39 Law Ed. 982.

> "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated." Chief Justice Marshall, in *U. S. v. Wiltberger*, 5 Wheat. 765; 5 L. Ed. 37-42.

> "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress. * * * But, this Court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress." 135 U. S. 255-261. U. S. v. Chase.

Also the following:

U. S. v. Sheldon, 2 Wheat. 119; 4 L. Ed. 199;
U. S. v. Clayton, 2 Dill. 219;
Murray v. State, 21 Tex. App. 620;
U. S. v. Wilson, 58 Fed. Rep. 769-771.

FASULO DID NOT WAIVE NOR IS HE PRECLUDED FROM URGING POINT (1) BECAUSE HE DID NOT RENEW HIS MOTION TO DISMISS AT THE CLOSE OF THE EVIDENCE, SINCE THE OBJECTION, THAT THE FACTS ESTABLISHED AT THE TRIAL CONSTITUTE NO CRIME, MAY BE URGED AT ANY TIME.

At the close of the Government's case Fasulo duly and regularly moved for a dismissal, on the ground that the facts do not violate Section 215 or Section 37, the evidence establishing only an attempted extortion. (Tr. page 93.) The *Naponiello* case was cited to the Court in support of the argument made on said motion. Under the circumstances violence would have to be done to reason and common experience to infer that Fasulo had abandoned his most important defense. The rule of Court urged finds its rationale in abandonment.

At the close of the trial and in due time before the trial judge began his charge to the jury, counsel for Fasulo requested an instruction to the effect that the evidence was not sufficient to sustain a verdict of guilty. (Tr. page 110.)

The request for said instruction was the equivalent of a renewal of said motion at the close of the trial or of a request for a directed verdict. To hold other-

wise is to sacrifice substance to mere form. But even if there were a substantial difference between said two requests, and even if there were a rule such as referred to by the Circuit Court of Appeals (Tr. top page 170), insistence upon that rule in the circumstances, apart from its being at variance with the commonest dictates of justice and fairness, would be violative of the letter and spirit of Section 269 of the Judicial Code. (*Barne's Code,* Section 1043.) That section was seasonably presented to said Circuit Court of Appeals and is to the effect that on the hearing of any appeal, writ of error, certiorari, etc., the Court shall give judgment after an examination of the entire record, *without regard to technical errors, defects or exceptions,* which do not affect the substantial rights of the parties.

It shocks the common sense of fairness and justice, that for a mere failure to observe an extremely technical rule, established by the Courts respecting a minor step of procedure, a defendant should be mulcted with the loss of his most important defense, to say nothing of the disastrous consequences of that loss. The punishment is out of all proportion to the offense.

But be the foregoing what it may, the rule invoked by the Circuit Court of Appeals is not applicable and is never applied where there is an utter absence of evidence to support the allegations of the indictment or where, as here, the facts established at the trial do not constitute an offense. There is a marked and material difference between the ground urged in the *Paine* case cited by said Court, namely the insufficiency of the evidence and the ground that conceding

that each and all the allegations of the indictment have been fully supported by the evidence, the facts established do not constitute an offense. It is unthinkable that one can be punished or be adjudged guilty of an offense not recognized by the law. The reason is therefore manifest for the rule that one may at any time urge that the offense charged or that the facts proving said charge constitute no crime.

Where the ordinary ground of the insufficiency of the evidence is urged at the close of the Government's case, there might be some semblance of a reason for inferring from defendant's failure to renew his motion, that he has abandoned his point, because material changes in the status of the case are likely to be effected by evidence introduced after the making of said motion. But, where as here, evidence introduced after said motion cannot effect said changes, there is no warrant for said inference. Moreover, for obvious reasons, there should be neither haste nor inclination to infer or presume that a defendant has abandoned a valuable defense.

It is trite and elementary learning that the objection that the complaint does not state facts sufficient to constitute a cause of action or that the indictment does not state an offense may be raised at any time and for the first time on appeal. The reasons are infinitely stronger for the application of that rule to a criminal case where, as here, the facts established constitute no offense.

Zoline Federal Criminal Law and Procedure,
Section 422, Note 2;

Clyatt v. U. S., 197 U. S. 207, 222, 49 L. Ed. 726-731;

Wiborg v. U. S., 163 U. S. 632, 658, 41 L. Ed. 289-298;

Weems v. U. S., 217 U. S. 349-362, 54 L. Ed. 793-796.

The Circuit Court of Appeals was decidedly half hearted, as if its sense of justice shrank instinctively from applying it, in invoking said rule, in that it apparently waived it, for it said immediately after referring to the rule (Tr. top page 170): "But in order that no possible injustice may be done we have examined the evidence and find that it is ample to support the allegations of the indictment." That statement is incorrect and is very likely to mislead. In the first place, the Court gravely errs in stating that the evidence supports the allegations of the indictment, for there is no evidence at all that supports said fictitious allegations. Secondly, it mistakes the question. The review or examination of the evidence it made was or should have been for the purpose of ascertaining not whether the evidence supported the allegations of the indictment but whether the facts established at the trial constitute an offense denounced by Section 215. In other words, the Court was there called upon to decide whether the facts established at the trial offended Section 215, and it went on to consider and decide another question as if it were the question in hand, and even in doing that assumed that the indictment stated a Federal offense. It obviously does not follow from the fact that the allegations of the indictment are fully supported by the evidence,

that the judgment should stand against Fasulo, for the question still remains undecided whether the indictment states a Federal offense.

ASSIGNMENT OF ERROR NO. 14.

The trial Court, over the objection of Fasulo, gave the following palpably erroneous instruction:

> "The existence of a conspiracy may be manifested either by words or deeds. In this case, therefore, even though you may find there was no open or express declaration of purpose on the part of these defendants, or other parties concerned to unite in doing the acts charged, yet if the acts have been committed or accomplished in a manner or under circumstances which by reason of their situation at the time and the conditions surrounding, give rise to a reasonable and just inference that they were done as a result of the previous agreement, then you are justified in finding that a conspiracy existed among them to do these acts." (Tr. page 134.)

In considering said instruction it should be borne in mind that the case against Fasulo was a pure and simple case of circumstantial evidence. According to the instruction given, all that the Government had to do was to have introduced enough evidence to give rise to a mere reasonable and just inference of the existence of the conspiracy. The instruction palpably ignores even the *quantum* of evidence required in an ordinary civil suit, not involving circumstantial evidence, where the plaintiff to prevail must establish not only a just and reasonable inference but must go further and establish his case by a preponderance of

the evidence. In a civil suit involving circumstantial evidence the burden is much heavier, "a theory cannot be said to be established by circumstantial evidence unless the facts relied upon are of such nature and so related to each other that it is the *only* conclusion that can fairly or reasonably be drawn from them."

Wilbur v. Emergency H. Assn., 27 Cal. App. 751-759, 151 Pac. 155;

In re McDevitt, 95 Cal. 18, 33-30 Pac. 101-106;

Estate of Mauvius, 43 Cal. App. 779-788, 185 Pac. 987-991;

Estate of Kilbourne, 162 Cal. 6-12, 120 Pac. 762-765;

People v. Staples, 149 Cal. 405-425, 86 Pac. 886-894;

10 *Cal. Juris.* 1157.

Estate of Anderson, 185 Cal. 700-708, 198 Pac. 407-411;

Hopkins v. Keller, 59 Cal. App. 447-454;

Kindt v. Parmenter, 200 Pac. 706;

In re Mauvais, 185 Pac. 987.

This being a criminal case, the *quantum* of proof required was far greater than even that required in a civil suit involving circumstantial evidence. It required that the inference relied upon by the Government as establishing the existence of the conspiracy must not only be just and reasonable, but in addition thereto it must exclude to a moral certainty and beyond all reasonable doubt every other reasonable inference, save the single one of the existence of the

conspiracy. It will not be disputed that whether the conspiracy existed or not was one of the two most vital and important questions in the case. That question, besides having a direct bearing on one of the essential elements of the crime charged, was also a cardinal question, for upon it depended the admissibility of much evidence, as, for example, the acts and statements of the respective defendants done or said not in the presence of one another. Owing to the importance of that question, Fasulo was entitled, as to it, to a correct instruction. Even in a civil suit the parties are entitled to instructions giving the law applicable to their respective theories.

Raymond v. Hill, 168 Cal. 473-479, 143 Pac. 743-748;

Renton v. Monsuer, 77 Cal. 449-455, 19 Pac. 820;

Louisville v. King, 115 S. W. 196-198;

Southern Const. Co. v. Hinkle, 89 S. W. 309-310.

Even if Fasulo had no right to an instruction applicable to a salient condition and most vital matter in his case, he certainly had a right not to be prejudiced or even hampered by an erroneous instruction on an important and vital matter.

No instruction was given in any other part of the charge upon the matter in question; but even if such instruction or instructions had been given, they would not neutralize or make amends for the error contained in the erroneous instruction. At best it would be a case of inconsistent instructions having been given

upon an important subject matter, and that constitutes reversible error even in civil litigation. Who can say when inconsistent instructions are given which of them influenced the verdict?

Deserant v. Cerillos Coal Co., 178 U. S. 409-420, 44 L. Ed. 1127-1133;
Eyre s. Const. v. Mackin, 81 Atl. 267-270;
Pullman v. Castor, 140 S. W. 848-850.

It should not be presumed that layman in the brief and hurried moments of the oral delivery of a multitude of instructions, can sufficiently grasp nice distinctions of legal principle, couched more or less in legal jargon, and can gather with substantial accuracy and retain in memory the purport of each rapidly passing instruction to enable them to reconcile inconsistent instructions or to supplement defective instructions by statements in other parts of the charge.

To know, in a multitude of instructions, which are defective, erroneous or inconsistent, requires ordinarily considerable intense and undisturbed study, and that not of what the memory has retained of an elusive and fleeting charge, but of the record there in permanent form before the eyes of the investigator.

Even in civil cases, which are not as exacting as criminal cases, we note the following:

> "Where an instruction informs the jury that the plaintiff may recover if they believe from the evidence certain facts stated in such instruction, if other facts essential to a recovery are omitted, such an instruction is fatally erroneous and cannot be cured by other instructions given in the

same series." *(McNulta v. Jenkins,* 91 Ill. App. 301.)

Richmond Trac. Co. v. Hildebrand, 34 S. E. 888-889;

Virginia etc. v. Chalkey, 34 S. E. 976-977;

Norfolk etc. v. Mann, 37 S. E. 849-851;

Knapp v. Chicago, 77 N. W. 657-658.

Said instruction went to the very heart of the case. The giving of it alone is sufficient ground for the reversal of the judgment against Fasulo.

ASSIGNMENT OF ERROR NO. 13

The trial Court erred in giving the following instruction:

> "Neither the Government nor the defendants are requested to call all the persons who have knowledge of any particular evidence. You are instructed that if one side produces one witness who was present at, or had knowledge of any particular event, the failure to produce other witneses who were present at, or had knowledge of the same event, cannot in and of itself be considered as suppression of evidence on the part of the same side, *and you are not to take such failure to produce such other witnesses as evidence that such witnesses would testify against the side which failed to call such witness or witnesses."* (Tr. page 134.)

Our objection is particularly directed to the foregoing sentence in italics.

The instruction was not only a command, a peremptory order to the jury not to draw the inference

indicated in said sentence, but it was also an argument in aid of Counsel for the Government to forestall and render of no avail our legitimate and warranted argument, as to those several instances of vigorously disputed facts which the record discloses, to the effect that the jury had a right to infer that the Government did not call said other available witnesses to the impugned facts, because their testimony would not, to say the least, have supported the testimony of the witness produced by the Government. Nothing more natural than that one whose word has been reflected upon, especially where the reflection has been wrought by valid arguments seemingly at least supported by facts and circumstances, or by cross-examination or otherwise, should immediately concern himself and busy himself to produce other persons, if any there be, to corroborate him and thus dispel that reflection. If he does not so do, the inference is natural and legitimate that those witnesses would not support his statement.

But of what avail was our argument as to said failure to produce said other witnesses after the instruction in question? But, apart from the effects of said instruction on our argument, no reasons or authorities are needed to prove that the jury had a right to draw any legitimate inferences from said failures which they saw fit to draw and particularly that they should not have been constrained to draw only the inference indicated in the instruction.

The great right of trial is denied to a defendant where the jury is given instructions such as the two

complained of. In order to keep this brief from becoming voluminous, we are compelled to omit a discussion of the several remaining assignments of error as to instructions, although we regard them as grave as those hereinabove discussed.

THE GOVERNMENT IS ESTOPPED FROM OBJECTING TO A REVIEW OF SAID INSTRUCTIONS EVEN IF FASULO HAD NOT TAKEN EXCEPTIONS TO THEM AS REQUIRED BY THE RULES OF COURT.

Before the instructions were given to the jury by the trial Court, counsel for Fasulo asked the Court in open Court and in the presence of the United States Attorney if it might be stipulated that defendants were deemed to have excepted to each and every instruction given and to each and every instruction refused, as if such exception should have been taken at the end of the charge.

The trial Court expressed reluctance at first to allow this to be done, but, upon its being stated that the United States Attorney consented, the Court also gave its consent. (Tr. pages 109-110.)

We submit that the Government should not be permitted to claim any advantage by reason of the fact that counsel for Fasulo relied upon that solemn stipulation and did not at the conclusion of the instructions except specifically to objectionable instructions. It is neither fair, seemly nor exemplary, nor is there any good reason why the Government, in a mere matter of minor procedure, should not be bound to respect the stipulations of its attorneys given in open Court

and sanctioned by the trial Court. If there had been at the time of trial any intimation that the stipulation would not be scrupulously adhered to, we would have taken exceptions in the usual manner. Had we done so we will not say that our exceptions would have been as many or as specific as the record discloses, for it is impossible for any lawyer within the brief and hurried interval elapsing between the delivery of the instruction and the retirement of the jury to except and point out specifically and clearly, as the rules of the Federal Court require, wherein each instruction is erroneous, where a multitude of instructions are given. Recognition of that impossibility and that said Federal rule as to excepting to instructions, tried by long experience, tends to hamper rather than promote the due administration of Justice, accounts for the fact that State Courts have discarded said rule.

To insist upon said rule in the circumstances, when insistence means such disastrous consequences to Fasulo and his, cannot be said to accord with the letter and spirit of criminal law or with the commendable desire to see matters decided on the merits. It certainly does not conform with Section 269 of the Judicial Code.

Furthermore, the record states that the exceptions relied upon were duly taken and the record imports absolute verity. (Tr. pages 122-123.) If technicalities are to be indulged, why not abide by the record, since so doing would allow a decision of this appeal on the merits?

The Circuit Court of Appeals seemed to attach importance to the fact that at the conclusion of the

charge the trial Court asked "if there was any subject upon which counsel would like to have the jury instructed"; and counsel remained silent. Said fact is of no importance at all. Counsel for Fasulo had seasonably presented written instructions to the Court which the Court rejected. At the very time the Court was about to begin its charge to the jury and while speaking of the charge to be given and the instructions presented, the trial Court mentioned (Tr. page 110) the rejected instructions, and, speaking of their purport, said he would not give them. Very evidently said inquiry was not directed to them, and Fasulo's counsel naturally did not answer the inquiry. The inquiry of the trial Court surely did not mean to ask us whether we desired to submit over again said rejected instructions. It certainly and very obviously meant that if we had any additional instructions which we had not already called to the Court's attention we might offer them. Not having any such additional instructions we made no answer to the Court's inquiry. Even apart from said statement of the Court respecting said rejected instructions, there is no reasonable ground for supposing that where counsel, as was done in this case, presents written instructions long in advance of argument, even before the testimony opened, and the trial Court has days and weeks to consider said instructions and then deliberately refuses to give them, that after all the instructions have been read to the jury, the trial Court would change its mind. On the contrary counsel would approach close to the verge of contempt of Court, if after the close of the charge, he arose and requested the Court all over again to give the rejected instructions.

ASSIGNMENT OF ERROR NO. 2.

The Court erred in refusing to allow Fasulo's wife to testify that the black hand letters were not in the handwriting of her husband. (Tr. page 99.)

It was and is urged in support of that ruling of the trial Court that the dead hand of the Judiciary Act, enacted by Congress over one hundred and thirty-five years ago, does not allow a wife to testify for her husband. Whether or not Fasulo wrote those letters, was the most vital and important issue of fact in the case. Owing to the gravity of the charge and the opinion of the handwriting expert it was extremely necessary that Fasulo call all available witnesses to exculpate himself. Who was in a better position to point out that the black hand letters were not in the handwriting of Fasulo, than his wife? It cannot be, for it would outrage the most elementary sense of fairness, that there should be one measure for the Government and another for the individual.

In the *Rosen* case (*U. S. v. Rosen*, 245 U. S. 467, 62 L. Ed. 406), Rosen, Wagner and Broder were indicted for conspiracy to buy and receive certain checks and letters. At the trial Broder pleaded guilty and when Broder was afterwards called as a witness for the Government, defendant Rosen objected that under the provisions of said Judiciary Act of 1789, Broder was not competent to testify for the reason that, as was admitted by the Government he had theretofore pleaded guilty of the crime of forgery and had served his sentence. The objection was overruled and this Court approved the ruling on the good

and reasonable ground that the rule was in strident disaccord with the present day more enlightened and generally accepted ideas of the admissibility of evidence and that the reason for the existence of the rule has long ago ceased. What reason can there be which demands that a rule of law be disregarded to permit a felon to testify but not to permit a respectable wife to testify for her husband? Is it even thinkable that a convict's testimony can be more conducive to the ascertainment of truth than that of an unimpeached respectable wife?

The rule against Fasulo, though enacted by Congress may well be regarded as being nothing more than it was prior to the enactment of said Judiciary Act and subject to be modified or set at naught by the Courts as was done by them before said Judiciary Act. The rule was first established by the Courts by judicial construction and was subject to modification by them whenever and according as their views respecting the efficacy and propriety of the rule was effected from time to time by the development of the general motions of justice and of the means for its attainment. It can hardly be thought that the Congress that enacted said Judiciary Act contemplated that the Courts should and would not deal with the rules of evidence established thereby as they had theretofore done. Note the following:

> "Those rules (referring to such rules as are in question) have not been derived from local usage, but at all times have been the creation of the Courts. In declaring them, judges have not appealed to the 'customs of the realms' as the source of the law rule, on the contrary they have laid

down the rules as the result of their own judgment touching what proof is fit for the consideration of the jury and what scope of inquiry is compatible with the reasonable dispatch of justice."

Chicago and N. W. Ry. Co. v. Kendall, 167 Fed. 63-68.

If we may so regard the rules of evidence contained in the Judiciary Act, there then can be no question but that the reasoning of the *Rosen* decision is absolutely sound and should be controlling here.

Note the following from the *Rosen* decision:

"While the decision in United States v. Reid, supra, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in Logan v. United States, 144 U. S. 263-301.

"The Benson case differed from the Reid case only that, in the former, the witness whose competency was objected to was called by the defendant. The testimony of the witness was admitted in the one case, but it was rejected in the other, and both judgments were affirmed by this court; however, forty years had intervened between the two trials. In the Benson case, decided in 1891, this Court, after determining that the Reid case was not decisive of it, proceeded to examine the question then before it 'in the light of general authority and of sound reason'; and, after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change 'which was wrought partially by legislation and partially by judicial construction' and how 'the merely technical barriers which excluded witnesses from the stand had been removed', proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

"Accepting as we do the authority of the later, the Benson case, rather than that of the earlier decision, we shall dispose of the first question in this case, 'in the light of general authority and of sound reason'.

"In the almost twenty years which have elapsed since the decision of the Benson case, the disposition of Courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it has been going forward before, under dominance of the conviction of our time that *the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding* who may seem to have knowledge of the facts involved in a case, *leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent; with the result that this principle has come to be widely, almost universally accepted in this country and in Great Britain.*

"Since the decision in the Benson case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury by the enactment of the Federal Criminal Code in 1909. This is significant because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that *the dead hand of the*

common law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower Courts on this first claim of error should be approved."

Aside from the foregoing reasons, the rule in question should be deemed to have ceased when the reason for its existence ceased. It was only, comparatively speaking, recently that the disability, under said "Judiciary Act", as to a defendant testifying in his behalf was removed. At the very time that the disability was removed as to a defendant the disability as to his wife was removed, if as some authorities say, the disability is founded on her interest in the outcome of the legislation.

But even if said rule be not founded in interest but be founded in public policy; the rule was obviously never intended to apply where both husband and wife desire and ask for what is most conducive to the attainment of the purposes of that public policy. The rule applies only as to what might wholly or in part thwart those purposes. Said public policy was intended for the preservation of the harmony, sacredness and integrity of the marital relations. Hardly anything can be conceived of more promotive or preservative of those relations than a wife testifying for her husband under circumstances such as are presented in this case. Nor can it be conceived that what the spouses Fasulo asked for, could in any way affect the United States harmfully. Therefore no public policy could be offended by permitting Mrs. Fasulo to testify. The rule of public policy is founded in reason.

It will be found that all the authorities which will be cited by the Government in support of the trial Court's ruling derive their authority and are based upon the Reid decision. *(U. S. v. Reid,* 12 Howard 36.)

The consideration of the *Reid* case affords another example of the Government's taking opposite stands as to the rule in question and nevertheless prevailing in each. In the *Reid* case the Government took the very opposite position it took in the *Rosen case.* It urged the rule in question and Clements, a convict, was not allowed to testify: while in the *Rosen* case, Rosen the defendant, urged the very same rule but Broder, a convict, was allowed to testify.

Before very briefly considering the *Reid* case we premise the following: Said Judiciary Act (section 34) provides that the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require shall be regarded as the rules of decision in trials *at common law in the Courts of the United States where they apply.*

It is beyond dispute that criminal trials were governed by the common law. Even at this late day an appeal in criminal cases is taken just as it was taken under the common law. Prof. Wigmore in his treatise on Evidence (sect. 5, sub. C) says that the construction that criminal cases are not included under the term *trials at common law,* is indefensible.

The fallacy responsible for the erroneous decision in the *Reid* case lies in its major premise, namely that

"Criminal cases are not included under the term trials at common law".

The argument advanced by the Court in support of said major premise is in substance the following: Said section of the Judiciary Act cannot be held to apply to criminal trials, because it cannot be supposed that Congress intended to give the States the power of prescribing rules in criminal trials, as that would put the sovereignty of the United States under the control of State sovereignty.

In view of the effects of the Judiciary Act in other respects upon the sovereignty of the United States, the argument was a baseless *argumentum in terrorem*. It sought to induce a fear much like that sought to be induced during the debates on the adoption of the Constitution of the United States, namely of the destruction of the States and of its leading to monarchy. There was more reason there for apprehension because Congress had not in its power to amend the constitution, and once the constitution was adopted, its repeal would have been practically impossible.

Dated, San Francisco,
September 14, 1926.

Respectfully submitted,

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